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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., *et al.*,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Fairlawn Meats, Inc., a corporation, Respondent in Cause No. 41, October Term, 1956, and, pursuant to Rule 58 (1) of this Court's Rules respectfully petitions the Court to grant its Petition for Rehearing as to the issues raised in said cause, and to set aside the Court's opinion rendered on March 25, 1957, vacating the judgment of the Ohio Court of Appeals and the Ohio Supreme Court below and remanding this cause for further proceedings not inconsistent with said opinion of this Court. As grounds for said Petition for Rehearing your petitioner states:

1. This cause was argued, considered, and decided in conjunction with two other causes[1] so that all three opinions, and the single dissenting opinion applicable to all three cases, must be examined together to appreciate the full effect of this trio of cases on this field of law. We will, therefore, generally treat all four opinions as though they constitute a single decision. Indeed, the opinion in this case specifically states that the decision in *Guss v. Utah L. R. B.*, controls.

2. Petitioner requests rehearing solely on one principal basis. Our request is based on the fact that the Court has completely ignored and apparently overlooked the fact that

> **The effect of this decision, which admittedly creates a vast no-man's-land where no agency or court, state or federal, has jurisdiction to entertain, hear and decide cases involving constitutionally and statutorily guaranteed rights, is to completely deprive the vast segment of the community falling within the vacuum area of their constitutional rights without due process of law in violation of the 5th, 10th, and 14th Amendments to the Constitution of the United States.**

We request rehearing on the issue that denial of due process of law has been inadvertently and unintentionally sanctioned by the March 25, 1957, decisions because:

a. Although the issue of due process of law was raised in the briefs, that argument is neither mentioned

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[1] *P. S. Guss, doing business as Photo Sound Products Manufacturing Co. vs. Utah Labor Relations Board*, 25 Law Week 4212; *Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 427 A. F. L. vs. Fairlawn Meats, Inc.*, 25 Law Week 4215; *San Diego Building Trades Council vs. J. S. Garmon*, 25 Law Week 4216.

nor answered anywhere in any of the four opinions announced, either majority or dissent.

b. Although previous decisions of this Court on the subject of federal preemption[2] have gone to great lengths and have been most explicit to demonstrate how the decisions there reached protect the basic right of due process, not one of the opinions announced herein refer to such language or make any attempt whatsoever to distinguish this case from those.

c. Although earlier cases on preemption have sometimes sustained and sometimes rejected the exercise of state jurisdiction in this field, it has never before done so in a manner that would leave judicial jurisdiction of litigation over historically recognized and constitutionally guaranteed rights in no competent tribunal whatsoever.

d. The opinion in *Guss* states that Congress' power in the area of commerce is so great that "its judgment must be respected whatever policy objections there may be to creation of a no-man's-land." We submit that the policy expressed in the Due Process Clause of the Constitution asserts a constitutional objection to the creation of a complete jural vacuum applicable solely to small business enterprises that must, on the contrary, be respected by Congress. Where the only issue is interpretation, and choice between two equally valid meanings of a statute, it is true that Congress' judgment as to which alternative policy is preferable must be accepted and respected. But where the policy adopted by Congress directly violates

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[2] *N. L. R. B. vs. Jones & Laughlin Steel*, 301 U. S. 1; *Garner v. Teamsters*, 346 U. S. 485; *United Construction Workers v. Laburnum*, 347 U. S. 656; *Weber v. Anheuser-Busch*, 348 U. S. 468; *Algoma P. & V. Co. v. W. E. R. B.*, 336 U. S. 301; *Building Trades Council v. Kinard*, 346 U. S. 933.

the absolute rights guaranteed by the Constitution, that legislative policy must be rejected by this Court even if it is expressed with unmistakable clarity. Congress' legislative power, however plenary, may only be exercised within constitutional limitations.

e. The opinion herein indicates that where the choice is between a judicial no-man's-land and a legislative attempt to achieve uniformity, the latter must prevail, without any recognition that Due Process—"a Day in Court"—is thereby denied.[3] We submit that where the alternatives are judicial Due Process or legislative objectives, the Constitution demands that the former be satisfied.

f. Satisfaction of the Constitutional requirement of Due Process can not be made dependent on the discretionary decision of an administrative tribunal to "reduce the area of the no-man's-land by reasserting its jurisdiction" or by "ceding jurisdiction under Section 10(a)." This is especially true since it is impossible to require the Board to do so,[4] since the Board has never in fact occupied the entire no-man's-land since its creation, and since it is impossible for the Board to execute any cession agreements under present circumstances. No matter what action the Board may decide to take in the future, in its uncontrolled discretion, Due Process will be denied in the interim and can equally be denied by a subsequent reversal of Board policy, if the March 25 decisions are permitted to stand.

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[3] *Truax vs. Corrigan*, 257 U. S. 312; *Brinkerhoff vs. Hill*, 281 U. S. 673.

[4] Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry, etc.

g. Nor may Due Process be denied because Congress may at some unknown future date decide to cure the unconstitutional deprivation of rights created by it and sanctioned by the opinions herein.

h. No matter how the opinions herein are worded or interpreted, the inescapable meaning and effect are the same: The Constitutional right of Due Process of law which guarantees a "Day in Court," and a judicial hearing and decision, as well as the statutory rights prescribed in the National Labor Relations Act itself, must be and will be provided only to those persons engaged in large business enterprises, but must be and will be denied to those who are too small to meet the Board's arbitrarily established jurisdictional standards.

i. We submit that Due Process of Law, in its constitutional and primary sense as defined by this Court, "requires that *every man* shall have the protection of his day in Court" [5] and the decisive question is "whether (he) has had an opportunity to present (his) case and be heard in its support." [6] That right is abridged and denied where a litigant is banished to a judicial no-man's-land where no tribunal has *jurisdiction* to entertain, hear, and decide his complaint. Affording due process only to those few applicants of sufficient financial stature to meet the Board's arbitrary, discretionary, but legally authorized jurisdictional standards draws a wholly unreasonable, indefensible, and unconstitutional line and denies due process to some men only because they are small where the Constitution requires that it be granted to all.

3. For the reasons above mentioned, and more fully stated below, we respectfully request that this Petition for Rehearing be granted.

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[5] *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 263.

[6] *Brinkerhoff-Faris T. S. Co. v. Hill*, 281 U. S. 673, 678.

BRIEF STATEMENT OF GROUNDS FOR PETITION FOR REHEARING.

As this Court stated in the majority opinion in the *Guss* case, "some background is necessary for an understanding of this problem in federal-state relations." This is especially true where the effect of the Due Process clause is to be examined. Part of this necessary background is the scope of the Act itself. Thus, when this Court, in the *Guss* opinion, states that Congress, by its language "empowering" the Board to prevent unfair practices, and by its definition of "affecting commerce" meant to reach "the full extent of its power under the commerce clause," that statement must be tempered by the language in other recent decisions of this Court. For example, "Congress has dealt with the subject but partially." [7] The Act "leaves much to the States." [8] "By the Taft Hartley Act, Congress did *not* exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause." [9]

Unless a multitude of earlier cases are to be impliedly overruled, it must be accepted that the Act does not preempt all state jurisdiction to the full extent possible, because "Congress designedly left open an area for state control." [10] The *Fainblatt* case, [11] which the *Guss* opinion cites as to the extent of preemption, deals only with the quantum of "affect" on commerce that is required before the Board may exercise the powers granted to it. *Fainblatt* merely makes clear that any amount over "de minimus" will suffice.

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[7] *Bethlehem Steel Co. v. NYLRB*, 330 U. S. 767.

[8] *Garner v. Teamsters*, 346 U. S. 485.

[9] *Weber v. Anheuser-Busch*, 348 U. S. 468.

[10] *International Union v. W. E. R. B.*, 336 U. S. 245.

[11] *Labor Board v. Fainblatt*, 306 U. S. 601.

But, as the earlier cases made clear, this is far from saying that Congress intended to completely preempt state jurisdiction in the entire area where *Fainblatt permitted* the Board to enter. Congress did not direct or require the Board to occupy the field to the full extent "permitted"—instead it only "empowered" the Board to do so.[12] Factually, the Board never has exercised its full judicial power but has always voluntarily limited its own jurisdiction, formally or informally. Also factually, both Congress and the Courts have been fully aware of this Board practice for a decade, and its propriety has never been questioned.[13] And while the majority opinion in the *Guss* case correctly states that "this Court has never passed" *directly* on the validity of this Board practice, the warning citation in footnote 7 to the *Denver* case[14] where this Court recognized that the Board "sometimes *properly* declines" to assert jurisdiction, certainly implies that the majority is not contrary minded. In fact the majority *Guss* opinion concludes that the Board "*can* greatly reduce" the no-man's-land by reasserting jurisdiction. It seems implicit that this Court would not have wasted a single moment describing as a legislative dilemma the unfortunate but true creation of a no-man's-land if that distasteful result could have been avoided by saying "the Board *must* completely erase" that vacuum by filling the void.

It is clear that the Act would not permit the latter solution. Section 10(a) only "empowers" the Board to prevent unfair practices; it does not direct or require it. As

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[12] See Section 10(a) of the Act.

[13] See citations, footnotes 3 and 4, dissenting opinion of Mr. Justice Burton herein.

[14] *Labor Board v. Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 684.

Mr. Justice Burton notes in the dissent, "The Board is not a Court whose jurisdiction over violations of private rights must be exercised." Thus it seems clear that Congress, the Federal Courts, the Board, the earlier decisions of this Court, the majority and minority Justices herein, and the parties hereto, all agree that the Board cannot be forced to exercise jurisdiction, or to hear and decide the questions presented, in these three cases or any other case in the vacuum area.

Otherwise stated, mandamus would not lie to compel the Board to entertain these cases. But if a tribunal has judicial or quasi-judicial jurisdiction it *must* be exercised; it has no power to decline to perform its required function and arbitrarily deny relief:

> "If * * * power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon the merits." *United States. ex rel. v. I. C. C.*, 294 U. S. 50, 61.[15]
>
> "Where a case is stated within the jurisdiction and powers of an administrative agency, it is the duty of that agency to entertain it, and in a proper case mandamus will issue to compel it to do so, and to proceed and hear the case on its merits." 34 *Am. Jur.* 909, Mandamus Sec. 127.
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> "Mandamus will lie to compel such administrative agencies to exercise the powers intrusted to them * * *" Ibid, Sec. 126.

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[15] See also *Interstate Commerce Commission v. U. S. Ex Rel.*, 224 U. S. 474; *U. S. ex rel. v. I. C. C.*, 252 U. S. 178; *U. S. ex rel. v. I. C. C.*, 246 U. S. 638; *N. L. R. B. v. Sterling Electric Motors*, 114 F. (2) 738, 741 (9 Cir.).

It is implicit in this Court's opinions herein that the Board can not be compelled to hear and decide, to "exercise" jurisdiction in the so-called no-man's-land. Congress did not desire it. The Act does not direct it. The Board can not accomplish it. But if judicial "jurisdiction and power" exist, it must be exercised. The "power" is clearly there. (Section 10(a) of the Act.) Inescapably, since mandamus does not lie, judicial jurisdiction must not exist. The Act and the Board's own declarations bear out this conclusion. The Act "empowers" the Board *to assert* jurisdiction but that permissible judicial jurisdiction lies "dormant and unexercised" until the Board extends it to a particular area as necessary to effectuate the policy of the Act. And this the Board has specifically declined to do with regard to the "sub-standard" no-man's land. By its own congressionally authorized action, the Board has no judicial jurisdiction over cases that fail to meet its announced standards!

Heretofore this Court has consistently made clear that it is the conflict between the exercise of state jurisdiction and federal jurisdiction over the same conduct that leads to application of the preemption doctrine. A multitude of cases are aptly summed up in the following quotation:

> "The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." *United Construction Workers v. Laburnum*, 347 U. S. 656, 665.

Now *for the first time* this Court sanctions an area where *neither* federal *nor* state judicial jurisdiction exists to govern conduct. *International Union v. W. E. R. B.*, 336 U. S. 245, held that where "conduct is governable by the

state or entirely ungoverned" *the state must act.*[16] The present decision instead votes for anarchy, for no-man's-land.

We submit that this decision which specifically sanctions an area where no judicial tribunal can or will exercise "jurisdiction" to hear and decide is violative of the fundamental concept of Due Process guaranteed by the 5th and 14th Amendments. This Court has defined that right as follows:

> "The due process clause requires that every man shall have the protection of his day in Court, and that benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which governs society." *Truax v. Corrigan*, 257 U. S. 312.

This principle is applicable to the field of labor law preemption. In one of the first cases on the original Wagner Act, this Court took pains to describe the Board procedure provided to satisfy the due process requirement:

> "The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.
>
> "* * * The Act establishes standards to which the Board must conform. There must be complaint, notice, and hearing. The Board must receive evidence and make findings. The findings as to the facts are to

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[16] See also *Weber v. Anheuser-Busch*, 348 U. S. 468, and cases there cited. Contrast the situation presented in these cases where Board declination of jurisdiction is said to result in *no* tribunal having jurisdiction, with that presented by cases arising under 28 USCA § 1404(a), *forum non conveniens*, where one tribunal having jurisdiction is permitted to decline to exercise it because there is another *available* and more appropriate forum where a Day in Court can be obtained.

> be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the Court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. * * *" *N. L. R. B. v. Jones & Laughlin S. Co.*, 301 U. S. 1, 46-47.

This "opportunity to secure judicial protection" which sustained the Wagner Act was still recognized in the *Garner* decision. There the Court denied state jurisdiction only after it established there was "no suggestion that the federal Board would decline to exercise its powers once its jurisdiction was invoked." It noted that Congress had taken in hand the "particular type of controversy" there involved and provided a Day in Court:

> "(Congress) went on to confide primary interpretation and application of its rules to a specific and specially constituted *tribunal* and prescribed a *particular procedure for investigation, complaint and notice, and hearing and decision, including judicial* relief pending a final administrative order. * * *" *Garner v. Teamsters*, 346 U. S. 485, 490. (Emphasis added.)

Again in *Laburnum* the Court noted that the plaintiff had a right for which there was a traditional state Court remedy for which the Act had "neither provided nor suggested any substitute." With due process obviously in mind, this Court sustained state exercise of jurisdiction to

provide the only available Day in Court with opportunity to be heard on the issue of damages.

> "* * * In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. *For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct.* We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act." *United Constr. Workers v. Laburnum*, 347 U. S. 656, 663. (Emphasis added.)

The Court in *Laburnum* further said:

> "Certainly the Act did not expressly relieve labor organizations from liability for unlawful conduct.
>
> "If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders * * * may destroy property without liability for the damage done * * *.
>
> "The jurisdiction of the Supreme Court of Appeals of Virginia is, therefore, sustained. * * *" (loc. cit. 347 U. S. 666, 669.)

If constitutional considerations require exercise of state jurisdiction where federal remedies are "impotent or inadequate" certainly Due Process demands the same result where federal remedies are non-existent, as they admittedly are in "no-man's-land."

Furthermore, the conduct involved in the instant case was unlawful under state law and a state remedy was provided. The majority notes that the same conduct was, in each case, unlawful under the federal Act, though remediless under the federal judicial procedures. Is there any more reason to grant these law violators "immunity from liability for their tortious conduct" than there was in Laburnum? Such is the effect of the March 25 opinion! The no-man's-land concept thus further denies due process by removing the only remedy for an admitted wrong!

> "To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless is, we think, to disregard fundamental rights of liberty and property, and to deprive the person suffering the loss of due process of law." *Truax v. Corrigan*, 257 U. S. 312, 330; 66 L. Ed. 254, 262.
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> "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it." *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U. S. 673, 682; 74 L. Ed. 1107, 1114.

A time-honored maxim states "no wrong without a remedy." In each of these three cases, the conduct was unlawful under state law. A wrong was done and a remedy was provided. The Act expresses no purpose to change that substantive law. Indeed as this Court noted, the Act declares this particular conduct unlawful as a matter of substantive federal law. There was no intention to destroy the right to a remedy—the Act provided a remedy to support that right where the controversy sufficiently affected commerce to warrant the Board's attention. But where the

Act's substitute remedy is not applicable on jurisdictional grounds, the admitted doubly-guaranteed right would become a hollow shell if the traditional, historic state remedy is also withheld. Rendering these admitted rights "remediless" by depriving persons "of all existing remedies" disregards fundamental principles and deprives the victim of Due Process of law. This the State may not do, as this Court has held in the above cases.

CONCLUSION.

We respectfully submit that the March 25, 1957, decision rendered herein adopts and sanctions a judicial no-man's-land doctrine that is repugnant to the Due Process Clause of the Constitution. The Constitutional guarantee of Due Process demands that any such theory of jural vacuum and judicial impotence be vigorously rejected. We believe that the brief discussion, *supra*, and the cases there cited demonstrates the gravity of the problem. We suggest that the total absence of any discussion of the effect of the Due Process Clause in any of the opinions herein, majority or dissent, indicates that this problem has indeed been overlooked, or at least not given the careful consideration it obviously deserves.

The seriousness of the situation is magnified when we consider the alternative in favor of which Due Process is violated, a Day in Court is denied, and State Courts are depotentiated. Has this decision even a chance of promoting "uniformity" in the sub-standard area? The federal law will not be uniformly enforced therein for the federal tribunal will not, and the state tribunals cannot, enforce it. The state laws cannot even be uniformly enforced within their own borders. Both state and federal laws can be consistently violated with complete impunity

by employer and union alike, just as has occurred in this trio of cases. It is futile to hope that the law of the jungle will produce anything but uniform chaos. We submit that the decisions herein which reluctantly sanctions denial of Due Process, *sub silentio*, do so without achieving any semblance of the desired "uniformity" that was hoped to be gained thereby.

We do not attempt in this limited petition to deal with the intricate implications or conflicting shades of meaning to be drawn from the *Bethlehem* case except to say that we earnestly suggest that the majority has misinterpreted its effect and application, probably through failure to appreciate the element of due process involved. But we suggest that, when that case is re-examined in the light of the Due Process clause, it will be seen that *Bethlehem* anticipated and stated the answer to the problem here involved. There this Court said that even where existence of federal power and coverage is admitted, and

> "even where extensive regulations have been made, if the measure in question relates to what may be considered a separate or distinct segment of the matter *covered* by the federal statute *and the federal agency has not acted on that segment* the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation * * *. The states are in those cases permitted to use their police power *in the interval.*" (330 U. S. Loc. Cit. 774 (Emphasis added).)

With regard to the sub-standard enterprises now banished to no-man's-land, the March 25 opinions have demonstrated the federal "coverage." No one denies Congress' "power" to regulate therein. But clearly this no-man's-land is a "separate and distinct segment" of the mat-

ter broadly "covered." Clearly the "federal *agency* has *not acted* on that segment." Clearly the "effectiveness of federal supervision *awaits* federal *administrative regulation*"! The majority opinion specifically invites that *agency* to reduce the area of this segment "by *reasserting* its jurisdiction."

In such cases, *Bethlehem* holds, and the Due Process Clause requires, that the states are permitted to act "in the interval."

We make this final comment: Observance of the due process requirement as herein proposed does not impinge on the "exclusive" power Congress granted the Board. The "inescapable implication of exclusiveness" mentioned by the majority derives from the second sentence of Section 10(a): "*This power* shall not be affected by any other means of adjustment or prevention * * *." What is "this power" which is exclusive? The first sentence provides "the Board is enpowered * * * to prevent" unfair practices. Such power "to prevent" is not affected by state regulation in the interval of non-regulation by the Board. Any time the Board determines that it wishes to exercise its power, the "interval" is automatically terminated thereby.

We therefore respectfully request that this petition for rehearing be granted.

Respectfully submitted,

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Certificate of Counsel.

This is to certify that this petition is presented in good faith, and with the honest and sincere belief of counsel as expressed herein and not for delay.

STANLEY DENLINGER.

April 16, 1957.